

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Dominic Lake Enterprises Ltd., operating as Falcann Septic Service & Chemical
Toilet Rental and Falcann Contracting
("Falcann")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR : David Stevenson

FILE NO.: 98/553

DATE OF HEARING: October 19, 1998

DATE OF DECISION: November 6, 1998

DECISION

APPEARANCES

for the Appellant:	George Gorrill Barb Swetlikoff
for the individuals:	in person
for the Director:	Shelley Burchnall

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Dominic Lake Enterprises Ltd., operating as Falcann Septic Service & Chemical Toilet Rentals and Falcann Contracting (“Falcann”) of a Determination which was issued on July 28, 1998 by a delegate of the Director of Employment Standards (the “Director”). In that Determination the Director found Falcann had contravened Sections 17, 18(2) and 34 in respect of the employment of Donna Trimble (“Trimble”) and Glenda Wasylenko (“Wasylenko”) and, pursuant to Section 79 of the *Act*, ordered Falcann to cease contravening the *Act* and to pay an amount of \$675.87. A substantial part of the amount determined to be owing was based on a conclusion by the Director that the regular wage for both the individuals was \$12.50 an hour.

Falcann challenges this conclusion, saying both individuals were told their wage rate would be \$10.50 an hour, increasing to \$12.50 an hour if or when a wage subsidy through the Kamloops Job Centre, for which both individuals were eligible, “kicked in”. Falcann also challenges the conclusion of the Director that the minimum daily pay provisions of the *Act* applied to some of the days worked by the individuals.

ISSUE TO BE DECIDED

The issue in this case is whether Falcann has established any ground for appeal.

FACTS

Trimble was employed by Falcann to work as a bookkeeper, with additional general administrative responsibilities in the business office. She was employed for a period commencing February 19, 1998 and her employment ended February 28, 1998. Wasylenko was also employed by Falcann in the same position. She was employed for a period commencing March 13, 1998 and her employment ended April 20, 1998. Both individuals were hired through the Kamloops Job Centre.

Gorrill gave evidence about the hiring of Trimble and Wasylenko. It was Gorrill’s evidence that he had talked generally with Shawn Read (“Read”), the Co-ordinator for the Targeted Wage Subsidy Program at the Kamloops Job Centre, about the wage subsidy program before he hired Trimble. He said that during the discussion he raised with Read about hiring a person at a lower wage rate, \$10.50 an hour, than what the person would receive once they were trained, which would be \$12.50 an hour.

He said he had posted an advertisement for a bookkeeper in the Unemployment Insurance office in Kamloops and had received about 40 applications for the position, one of which was Trimble's. He said he then talked to Read about hiring Trimble, that Read knew the "deal" was that she would get \$10.50 an hour to start and that he would confirm that to the Tribunal. Gorrill also said Read indicated that Trimble had signed the wage subsidy papers. Gorrill interviewed Trimble on February 17 and told her that the wage rate for the job would be \$10.50 an hour, increasing to \$12.50 an hour when the subsidy "kicked in".

Read testified he had no discussion with Gorrill about a wage subsidy for Trimble and, in fact, had no discussion with Gorrill about Trimble at all until after she complained to Labour Standards. Trimble's placement with Falcann was a "straight placement", that is, there was no reference to a wage subsidy, and Read was not involved in any way in that placement. He testified that had a wage subsidy been sought for the position being offered, Gorrill would have been told the position did not qualify as a wage subsidy job as it offered less than 30 hours of work a week. Read also testified that Gorrill made no reference to starting a person at \$10.50 an hour until after the Employment Standards complaints had been made by Trimble and Wasylenko.

Trimble testified she was telephoned on the morning of February 17 by a representative of the Kamloops Job Centre and told there was a part-time bookkeeper position available at Falcann. She was given the name of Mr. George Gorrill ("Gorrill") as the contact person. She telephoned Gorrill and a brief discussion ensued about the available position. It was Trimble's evidence that she confirmed over the telephone that the wage rate for the position would be \$12.50 an hour. Based on that information, she called the Job Centre representative, who had requested she call back with certain details about the position, and conveyed to her the details of the position as stated by Gorrill, including the location of the job and the wage rate. Also based on her telephone conversation with Gorrill, she drove to Falcann's office the same day, met with Gorrill for approximately four hours and had a wide ranging discussion about the requirements of the job, which included re-affirmation that the wage rate for the job would be \$12.50 an hour. She said there was no reference to a wage rate of \$10.00 to \$10.50 an hour to start. She did tell Gorrill she was eligible for the targeted wage subsidy program and there was some discussion about Trimble making an application for a subsidy, but she never did.

She quit the job February 28, 1998, because she found Gorrill to be unreasonably demanding of her and at the same time unwilling to provide her with the help she required from the previous bookkeeper to understand his unique bookkeeping system.

Gorrill's evidence concerning the hiring of Wasylenko was similar to his evidence concerning the hiring of Trimble. He says he told her the wage for the position would be \$10.50 an hour until the wage subsidy "kicked in", at which time it would increase to \$12.50 an hour.

Wasylenko testified that Gorrill told her at the time she was hired that the wage rate for the job would be \$12.50 an hour and that there was no reference to being paid a lower wage rate until a wage subsidy was approved. She testified that Gorrill approached her at the end of March and asked her to accept \$10.50 an hour for the hours she had worked up to March 31, 1998. He said he was over-extended and couldn't afford to pay \$12.50 an hour at that time. He promised to make up the difference when he received the wage subsidy. Wasylenko agreed to what Gorrill proposed and, as bookkeeper, prepared herself a cheque based on 37 hours of work at \$10.50 an hour, less statutory deductions. At the same time as she agreed to accept \$10.50, Wasylenko entered her wages on the payroll in the computer at \$12.50 an hour.

Falcann signed a Targeted Wage Subsidy Agreement for Wasylenko on March 27, 1998. Wasylenko signed the Targeted Wage Subsidy Agreement on April 1, 1998. The agreement providing the wage subsidy became effective on March 30, 1998. It is noteworthy that the position, which had been described by Gorrill as offering 2-3 hours a day, 20 hours a week in the job order to which Trimble responded, is described in the Agreement as offering 30 hours a week. Read testified that the minimum number of hours a week a job

could offer and still be subsidized was 30 hours. He also testified that Gorrill had come to him to ask for a wage subsidy for Wasylenko.

On balance, I accept the evidence of Trimble and Wasylenko that they were told by Gorrill they would be paid \$12.50 an hour. I also accept that there was no reference to being paid \$10.50 an hour to start and that promise to pay \$12.50 an hour was not qualified by any reference to a wage subsidy. I reach this conclusion for a number of reasons. First, Read says there was no discussion at all between he and Gorrill concerning Trimble before she was hired. This evidence, from an individual who is entirely disinterested in the outcome of this appeal, does two things: first, it calls into question Gorrill's recollection about events surrounding the employment of Trimble; and second, it suggests that Gorrill was not hiring Trimble under the wage subsidy program and would be unlikely to refer to it when discussing the wage rate with her. Second, Gorrill relied on Read to support his assertion that he told Trimble and Wasylenko they would get \$10.00 - \$10.50 an hour to start. This assertion was not confirmed by Read, who said Gorrill only made this comment after the complaints had been made by Trimble and Wasylenko. Third, the statement from Trimble that she was eligible for a wage subsidy was raised by her *after* she and Gorrill had discussed the wage rate, again making it unlikely that Gorrill would have had a wage subsidy rate in his mind at the time he and Trimble discussed the wage rate. Fourth, Gorrill's casual response to the information from Trimble that she was eligible for a wage subsidy suggests he was not aware at the time she was hired of how a wage subsidy might apply to the position offered. Fifth, documents created at the time Trimble was hired refer to the wage rate as being \$12.50 an hour. The only persons involved in any discussions relating to the position, and the wage rate, were Gorrill, Trimble and a representative of the Job Centre. Based on the evidence, including Exhibits 2 and 3, I find it probable the \$12.50 an hour wage rate came from Gorrill. Neither Trimble nor the Job Centre representative had any reason at all for fabricating the wage rate for the purposes of the Job Centre records. Trimble did not have the job at the time and was only communicating information back to the Job Centre representative as requested. Sixth, Gorrill's assertion that Wasylenko was to be paid \$10.50 an hour until the wage subsidy "kicked in" is not consistent with the fact that he paid her \$10.50 an hour for March 30 and March 31, which were days she worked *after* the wage subsidy "kicked in". It also adds plausibility to her description of how she came to receive \$10.50 an hour for the first pay period of her employment with Falcann.

Finally, there was a general vagueness in the evidence of Gorrill, some inconsistencies between his evidence and earlier statements made and an uncertainty concerning important elements of the issue that cause me accept the evidence of Trimble and Wasylenko over his evidence.

ANALYSIS

Gorrill raises two matters in this appeal. The first relates to the wage rate for Trimble and Wasylenko. The second relates to minimum daily hours. There is no factual dispute on the second matter. Gorrill simply says that the individuals controlled their coming and going and he should not be responsible for minimum daily hours in those circumstances.

In respect of the second matter, I agree completely with the position of the Director that it is Falcann's responsibility under the *Act* to prepare and display hours of work notices (see Section 31 of the *Act*). Part of that responsibility includes scheduling employees according to the requirements of Section 34 of the *Act*, minimum daily hours. If that requirement was met, the Tribunal might hear argument about whether an employee who, through her own conduct, did not work the hours for which she was scheduled is entitled to minimum daily hours, but that argument does not arise in this case, where Falcann has failed to comply with that requirement. The appeal on the minimum daily hours is dismissed.

On the matter of the wage rate, Falcann has the burden of showing the Director was wrong to conclude the regular wage for Trimble and Wasylenko was \$12.50 an hour. Falcann has failed to meet that burden and the appeal on this point is also dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 28, 1998 be confirmed in the amount of \$675.87, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal